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From	Carol Montoya <cmontoya@marcelluscoalition.org>
To	LisaP Jackson/DC/USEPA/US@EPA
cc	Kathryn Klaber <kklaber@marcelluscoalition.org>; Andrew Paterson <apaterson@marcelluscoalition.org>
Subject	MSC Response to Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required to Report under the Toxics Release Inventory

Message Body

Sent on behalf of Kathryn Z. Klaber, President

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SHALE COALITION™

December 18, 2012

Hon. Lisa Jackson, Administrator
U.S. Environmental Protection Agency Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Mail Code 1101A
Washington, DC 20460

Re: Marcellus Shale Coalition Response to Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required to Report under the Toxics Release Inventory

Dear Administrator Jackson,

On October 24, 2012, the Environmental Integrity Project and sixteen other organizations (Petitioners) submitted a Petition requesting that the U.S. Environmental Protection Agency (EPA or Agency) initiate rulemaking to add the "Oil and Gas Extraction Industry," as identified by Standard Industrial Classification Code 13 (Oil and Gas) to the list of industries required to complete toxic chemical release forms pursuant to Section 313 of the Emergency Planning and Community Right to Know Act (EPCRA). The Marcellus Shale Coalition (MSC) provides the following response to the Petition and, for the reasons set forth below, urges the Agency to deny the Petition.

The MSC is a regional trade association with a national membership. The MSC was formed in 2008 and is currently comprised of approximately 300 producing and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, transmission, and gathering in the country, as well as the suppliers and contractors who service Oil and Gas.

I. Introduction and Summary

EPCRA's reporting requirements were established in 1986 and originally applied to manufacturing industries that manufactured, processed or used toxic chemicals in a manner such that reporting by these facilities is relevant to the purposes of EPCRA Section 313. In 1996 and 1997, the Agency engaged in an initial effort to expand the list of industry sectors subject to EPCRA Section 313.[1] At that time, the Agency considered adding Oil and Gas but declined to move consideration of Oil and Gas beyond the initial screening process because the unique nature of this industry, when viewed in light of the statutory prerequisites for regulation, indicated that the employee and chemical thresholds that trigger Toxic Release Inventory (TRI)

[1] *See* 61 Fed. Reg. 33588 (June 27, 1996); 62 Fed. Reg. 23834 (May 1, 1997).

reporting were unlikely to be met.[2] Last year EPA commenced a second effort to expand the list of industry sectors subject to EPCRA Section 313, but again did not include Oil and Gas.[3]

Against this backdrop, the Petitioners submitted a Petition urging EPA to revisit its 1997 decision and now include Oil and Gas as one subject to EPCRA Section 313. Petitioners' central argument is that the nature of Oil and Gas has changed dramatically over the past fifteen years in ways that would now support a finding by EPA that Oil and Gas should be subject to the TRI Program.

It is true that Oil and Gas has changed dramatically over the past fifteen years. In particular, advances in horizontal drilling techniques combined with the use of hydraulic fracturing technology have allowed Oil and Gas to unlock vast quantities of natural gas and hydrocarbons previously trapped in tight shale formations like the Marcellus and other geological formations. These technological advances have provided the United States with a plentiful domestic energy supply, while at the same time creating hundreds of thousands of American jobs.

While certain aspects of Oil and Gas have changed, however, the key factors that led to EPA's 1997 decision not to add Oil and Gas to those subject to TRI reporting remain the same. Specifically, the volume of toxic chemicals, as defined in EPCRA, manufactured, processed or otherwise used at standard Oil and Gas facilities remain below TRI thresholds, thereby defeating the purposes of the listing, as EPA previously concluded. In fact, the data Petitioners present—even as mischaracterized—do not describe a change in facts that would warrant a reversal of EPA's prior decision. Instead, Petitioners' lengthy submission amounts to a request that EPA substantially revise the legal and regulatory framework that EPA applies to the question of whether an industry sector should be subject to EPCRA Section 313. The MSC urges EPA to decline Petitioners' invitation to radically change EPCRA's statutory, regulatory and policy framework in this manner.

While the MSC questions the accuracy of some of the data cited by Petitioners, the purpose of this response is not to present a point-by-point rebuttal of all of the assertions made by Petitioners. Rather, the MSC's comments highlight the more fallacious arguments asserted by Petitioners, focusing on Petitioners': (1) attempt to rewrite the current EPCRA Section 313 framework; (2) incorrect interpretations of existing law and regulations; and (3) more egregious factual inaccuracies. Accordingly, the Agency should not interpret the absence of a challenge to a specific aspect of the Petition as representing agreement with any factual assertion or legal position presented by Petitioners, and the MSC explicitly reserves the right to challenge any aspect of this Petition in any future proceedings.

II. Discussion

As part of its rulemaking, EPA established three factors it would apply as part of any assessment as to whether to subject a new industry to TRI reporting: (1) whether one or more toxic

[2] 61 Fed. Reg. at 33592.
[3] *See* EPA, TRI Industry Sectors Expansion, *available at* http://exhange.regulations.gov/exchange/topic/trisectorsrule/.

chemicals are reasonably expected to be present at facilities within the candidate industry group (chemical factor); (2) whether facilities within the candidate industry group manufacture, process or otherwise use the toxic chemicals (activity factor); and (3) whether facilities within the candidate industry group can reasonably be anticipated to increase the information made available to the public or otherwise further the purposes of EPCRA Section 313 (information factor).[4]

In their submission, Petitioners address the first two factors by summarizing (and in some cases mischaracterizing) a slew of aggregate operational data about Oil and Gas.[5] Most of these are irrelevant for purposes of assessing whether individual facilities within Oil and Gas should be subject to EPCRA and is simply an attempt to present in a negative light the unremarkable conclusion that oil and gas extraction facilities use some amount of TRI-listed chemicals. Petitioners next argue that unlike in 1997, a significant number of oil and gas extraction facilities now meet TRI reporting thresholds, thereby satisfying the information factor of EPA's three-pronged test.[6] All of Petitioners' arguments, however, would require EPA to adopt a new legal definition of "facility" for Oil and Gas and are based upon a fundamentally incorrect interpretation of the application of TRI reporting thresholds. Furthermore, Petitioners' supporting arguments concerning EPCRA's treatment of trade secret protections and the need to use TRI reporting to provide incentives to the industry are entirely misplaced.

A. EPA's Rulemaking Decision To Exclude Oil and Gas Was Proper

Petitioners attempt to dismiss EPA's decision not to subject Oil and Gas to TRI reporting as a minor technical issue, asserting that by 1997 "there was little question" that the oil and gas extraction industry met these three factors, but EPA chose not to add Oil and Gas due to "technical questions" about how EPCRA's definition of "facility" should be applied to the industry.[7] In fact, EPA's decision not to include Oil and Gas was not based simply on "technical questions" about the definition of a facility, but rather an affirmative finding by EPA that at the smallest facility units "neither the employee nor the chemical thresholds are likely to be met" to subject Oil and Gas facilities to TRI reporting.[8] EPA indicated at the time that it would continue discussions with the Oil and Gas industry and other interested groups about TRI reporting in the future, but such a commitment does not render EPA's ultimate decision, or the reasoning behind it, any less valid. Indeed, as noted below, the reasoning behind EPA's rulemaking, *i.e.*, that the oil and gas extraction facilities would not exceed TRI reporting thresholds, remains true today.

B. EPA Should Not Adopt a New Definition of "Facility" for Oil and Gas

Petitioners clearly recognize that the quantities of Section 313 chemicals manufactured, processed or otherwise used at a standard facility unit for the oil and gas industry (*i.e.* an individual well) remain below TRI reporting thresholds. To combat this fatal flaw in their

[4] 61 Fed. Reg. at 33594.
[5] *See* Petition at 22-59.
[6] *See id.* at 68.
[7] In addition, it should be noted that EPA did not consider the oil and gas extraction industry beyond the screening stage, and therefore EPA did not specifically apply its three part framework to the industry. Accordingly, it is at best an overstatement to say that there was "little question" that the industry met the three factors.
[8] 61 Fed, Reg, at 33592.

analysis, Petitioners urge EPA to adopt a new, expanded definition of "facility" that artificially treats individual oil and gas components located across many square miles as a single facility. EPA, however, has no authority to redefine the term "facility" absent new legislation and cannot rewrite EPCRA simply because it supports the Petitioners' agenda in this instance.

Section 329(4) of EPCRA defines a "facility" as "all buildings, equipment and other stationary items which are located on a single site or on *contiguous or adjacent sites* and which are owned or operated by the same person (or by any person which controls, is controlled by, or is under common control, with such person)."[9] Petitioners appear to believe that "proper" application of this definition requires individual operations separated by miles to be considered "adjacent" because the operations are somehow "integrated," a term and a concept that is nowhere to be found in the EPCRA definition of "facility." Recent case law and regulatory policies in other contexts, however, have rejected the notion that any evaluation as to whether two operations are "adjacent" can take into account the functional relationship between the two operations. For example, the Sixth Circuit, in *Summit Petroleum Corp. v. EPA*,[10] recently considered whether multiple natural gas operations could be considered adjacent for purposes of EPA's Title V permitting program based in part on an evaluation as to whether the sources were functionally interdependent. The panel rejected this approach, holding instead that the term "adjacent" was unambiguous and the plain meaning of term implicates only physical and geographic concerns.[11] In support of its decision, the panel cited several other cases recognizing that questions of adjacency are "purely physical and geographical,"[12] including the Supreme Court's decision in *Rapanos v. United States*,[13] which evaluated the term "adjacent" for purposes of determining the extent of the Army Corps of Engineers' jurisdiction over wetlands adjacent to waters of the United States. In sum, Petitioners cannot simply adopt a definitional construct of "facility" that artificially inflates the level of chemical use.[14]

The *Tyson Foods* Analysis Does Not Support Petitioners' Claim

In light of the trend that properly limits questions of adjacency to an evaluation of physical proximity, Petitioners' attempts to demonstrate that multiple oil and gas operations separated by miles can be considered a single facility for purposes of TRI reporting come up short. First, Petitioners cite a district court case, *Sierra Club v. Tyson Foods*,[15] in support of their argument that EPCRA's definition of "facility" can be stretched to cover multiple wells over large areas.[16] *Tyson Foods*, however, involved the issue of whether individual chicken houses on a single farm

[9] 42 U.S.C. § 11049(4). (emphasis added).
[10] 690 F.3d 733 (6th Cir. 2012).
[11] *Id.* at 741-43.
[12] *Id.* at 743-44.
[13] 547 U.S. 715 (2006)
[14] Similarly, the Pennsylvania Department of Environmental Protection ("PADEP") recently adopted a final policy to be used for determining whether emissions from multiple operations should be aggregated for purposes of determining whether such sources where subject to major source air permitting programs. Consistent with the Sixth Circuit's *Summit* decision, PADEP emphasized that the plain meaning of the term adjacent relates to spatial distance or proximity. Based on that concept, PADEP established a quarter mile "rule of thumb" for purposes of evaluating the adjacency of two or more operations, pursuant to which operations separated by more than one quarter mile may only be considered adjacent on a case-by-case basis. Other states have used this quarter mile rule of thumb in similar permitting decisions.
[15] 299 F. Supp. 2d 693 (W.D. Ky. 2003)
[16] Petition at 68.

are separate EPCRA facilities. The chicken houses were spaced only **50 to 60 *feet*** apart and were all located on land owned by a single person.[17] These facts made it easy for the court to find that the chicken houses fell within EPCRA's requirement that individual operations making up a facility be "contiguous or adjacent." [18] The close proximity of the chicken houses and the simple ownership arrangement clearly met the statute's definition of "facility."[19]

As noted by Petitioners, the distance between typical oil and gas facilities is measured in ***miles*** not feet. Accordingly, contrary to Petitioners' assertions, the Court's analysis in *Tyson Foods* does not support an approach that seeks to link multiple oil and gas wells as a standard facility unit for purposes of TRI reporting.

Petitioners' factual analysis of "proximity" is flawed

Petitioners next argue that current oil and gas production, in particular natural gas production in the Marcellus shale region, has resulted in a high concentration of natural gas wells in close enough proximity to be considered a single facility. Simple math applied to Petitioners' own figures, however, demonstrates that their position stretches the notion of "adjacent" beyond any common-sense notion of physical proximity. Regarding Cabot's operations in Dimock, PA, Petitioners emphasize that all the wells are located within a 3.5 mile radius.[20] What Petitioners do not say, however, is that this means that these wells, which they apparently believe should be considered a single facility, may be separated by as much as ***7 miles*** and are located over an area of ***38.5 square miles***. Similarly, the Talisman wells in Columbia, PA and the EOG Resources wells in Lawrence, PA referenced by Petitioners are (according to Petitioners' figures) located across areas of approximately ***66.5 square miles and 30.2 square miles***, respectively.[21] Operations spread out over such large areas, contrary to Petitioners' assertions, are not "adjacent" in any sense.[22]

Application of EPA's Greenhouse Gas Reporting Program is inappropriate

Petitioners also suggest that EPA's unique approach towards oil and gas facilities under EPA's Greenhouse Gas Reporting Program (GHGRP) "has laid much of the groundwork" for an approach that allows individual wells spread out over as much as 66.5 square to be considered a single facility for purposes of TRI reporting.[23] A cursory review of the history and reasons behind the GHGRP's unique rule applicable to Oil and Gas demonstrates that Petitioners' reliance is misplaced.

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[17] 299 F. Supp. 2d at 700.
[18] *Id.* at 711.
[19] Finding such operations to be "contiguous or adjacent" was the only reasonable conclusion the court could reach, particularly in light of the emphasis EPA's facility determination guidance places on physical proximity. *See, e.g.*, EPA, *EPCRA Section 313 Questions and Answers*, EPA-745-B-98-004, at16 (Dec. 1998); *EPCRA Section 313 Industry Guidance: Electricity Generating Facilities*, EPA-745-B-00-004, at p. 2-4 (Feb. 2000).
[20] Petition at 68.
[21] *See id.* at 69.
[22] Notably, the natural gas operations at issue in the Summit case referenced previously, where the Sixth Circuit rejected EPA's evaluation functional interdependence to determine adjacency, were located over an area of approximately 43 square miles at distances varying from 500 feet to 8 miles.
[23] Petition at 70-71,

As an initial matter, it is important to recognize that in developing a definition of "facility" for purposes of the GHGRP, EPA was not, in contrast to EPCRA, constrained by a statutory definition of "facility." Instead, EPA's statutory authority to develop the GHGRP was derived from the 2008 Consolidated Appropriations Act,[24] which simply directed EPA to develop a mandatory greenhouse gas reporting rule,[25] and EPA's general authority to request emissions information under Section 114 of the Clean Air Act.[26] Neither statutory provision included a definition of "facility." Thus, EPA was generally free to develop any definition of facility that it felt served the purposes of the GHGRP. Pursuant to that authority, EPA promulgated a general definition of "facility" that, like EPCRA's definition, focuses on spatial distance.[27] It is telling, however, that in light of this geographically focused definition, EPA felt it was necessary to promulgate a unique, broader definition of "facility" for Oil and Gas that roped in all commonly owned operations in a single hydrocarbon basin (an action it could take because, unlike in EPCRA, EPA was not constrained by a statutory definition of the term "facility"). To adopt Petitioners' expanded notions of what constitutes an oil or gas extraction "facility" for purposes of TRI reporting, EPA would be required to promulgate a new, unique rule that expanded the term specifically for Oil and Gas, something EPA does not have the authority to do under EPCRA. Accordingly, it is clear that Petitioners cannot rely upon EPA's actions under the GHGRP to support an argument that EPA has authority to expand the definition of "facility" as applied to Oil and Gas for purposes of TRI reporting in the absence of an amendment to EPCRA and its corresponding regulations.

In addition, and perhaps more importantly, the policy reasons behind why EPA chose to adopt a unique definition of "facility" applicable to Oil and Gas for purposes of the GHGRP are fundamentally dissimilar to the purposes served by the TRI program. EPA has noted that the purpose of the GHGRP is to provide accurate and timely data essential to informing future climate policy decisions, an issue of national, as well as global, scope.[28] With respect to the onshore oil and gas industry specifically, EPA noted that adopting a basin level approach under the GHGRP would allow EPA to gather important data from this industry to inform this national and global policy.[29] By contrast, the focus of the TRI reporting program is, by definition, intended to be more local because, as noted by EPA—and acknowledged by Petitioners—"the purpose of EPCRA section 313 is to provide information to the public about toxic chemicals *in their communities*."[30] In short, the national and global policy reasons that supported a unique definition of "facility" under the GHGRP are not relevant to the locally focused policies behind TRI reporting, and therefore Petitioners' reliance on the GHGRP is misplaced.

C. Petitioners Misinterpret TRI Threshold Requirements

After urging EPA to adopt a new definition of "facility" for purposes of TRI reporting, which requires new legislation, the Petitioners assert that even without a new definition, individual

[24] Pub. L. No. 110-161, 121 Stat. 1844.
[25] 121 Stat. at 2128.
[26] 42 U.S.C. § 7414.
[27] 74 Fed. Reg. 56260, 56387(Oct. 30, 2009) (promulgating 40 C.F.R. § 98.6).
[28] *See* 74 Fed Reg. 16448, 16463 (Apr. 10, 2009).
[29] "[R]eporting at this level would provide the necessary coverage of GHG emissions to inform policy." 75 Fed. Reg. 74458, 74467 (Nov. 30, 2010).
[30] 61 Fed Reg. at 33594 (emphasis added); Petition at 6 (describing one of TRI's goals as "encouraging informed community-based environmental decision making").

industry components—specifically wells, gathering and boosting components—manufacture, process or otherwise use toxic chemicals in excess of applicable TRI reporting thresholds. Petitioners' arguments, however, reflect a fundamental misunderstanding of the analysis required to determine whether a facility has exceeded the 25,000 pound (for manufacture or process) or 10,000 pound (for use) thresholds. Under EPCRA Section 313(f), this threshold analysis is completed on a chemical-by-chemical basis, not by determining the aggregate weight of all TRI chemicals present at a facility. Petitioners claim, however, that TRI reporting is required if the ***combined weight of all TRI chemicals*** manufactured or processed at a facility exceeds 25,000 pounds, or the ***combined weight of all TRI chemicals*** otherwise used at the facility exceeds 10,000 pounds.[31] Petitioners' position on threshold calculations is simply incorrect, and this fundamental error defeats their position that individual facilities in the oil and gas industry might exceed TRI reporting thresholds.

Whether a threshold prescribed by Section 313(f) of EPCRA has been exceeded is determined on a chemical by chemical basis, not by combining the weight of all TRI chemicals that may have been manufactured, processed or used exceeds the threshold:

> The threshold amounts for purposes of reporting chemicals under this section are as follows:
> (A) With respect to a toxic chemical used at a facility, 10,000 pounds of ***the toxic chemical*** per year...
> (B)(iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of ***the toxic chemical*** per year.[32]

These thresholds, with the explicit references to "the toxic chemical", are repeated in the corresponding regulations.[33]

Contrary to EPCRA's express provisions that require a chemical-by-chemical calculation, Petitioners appear to believe that the aggregate volume of all TRI chemicals at a facility determines TRI applicability. For example, Petitioners argue that industry data concerning total hazardous air pollutant (HAP) emissions are above TRI reporting thresholds, but they fail to differentiate the HAPs in question, completely ignoring the TRI requirement to evaluate the amount of each individual HAP.[34] Petitioners are even more explicit, and equally wrong, in their statements about the use of chemicals in the well development process. With respect to drilling muds, Petitioners incorrectly assert—twice—that that the reporting threshold for TRI-listed metals is "10,000 pounds per year, either individually or combined with other listed chemicals."[35] The Petitioners then apply this mistaken approach to an EPA data set and state that the ***combined*** volume of TRI listed metals present in Barite could exceed 10,000 pounds, [36]

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[31] *See* Petition at 75, 77.
[32] 42 U.S.C. § 11023(f)(1) (emphasis added)
[33] 40 C.F.R. § 372.25. EPA has established specific chemical categories (*e.g.*, nickel compounds) for which facilities are required to total all volumes of the chemicals that fall within the category and then determine if the specific chemical category exceeds the threshold. See 40 C.F.R. § 372.25(c) and §372.65(c). Petitioners' argument, however, is not that chemicals used at well sites fall under one of these categories, but rather that the weight of all TRI chemicals used, manufactured or processed at a facility should be totaled in all instances.
[34] Petition at 73-74.
[35] *Id.* at 75.
[36] *Id.* at 76.

a figure completely irrelevant for purposes of determining whether TRI thresholds have been triggered.

Petitioners repeat their incorrect interpretation of TRI threshold determinations in their discussion about methanol use. Specifically, Petitioners calculate that at what they assert are "low" methanol injection rates, an average gas well would use approximately 1,100 pounds of methanol.[37] According to Petitioners, this means that "a facility containing nine such wells ***or using 9,000 pounds of other reportable chemicals, such as benzene or the metals in barite, would trigger the TRI reporting threshold.***"[38] The second half of this statement is flatly wrong. In order for this facility to trigger the use threshold, the facility would have to use 10,000 pounds of methanol, 10,000 pounds of a TRI listed metal, or 10,000 pounds of benzene. If the weight of these chemicals used at the facility when considered individually is below 10,000 pounds, no TRI reporting is required even if the combined weight of these chemicals exceeds 10,000 pounds.[39]

In sum, the application of the proper legal definition of "facility" together with the prescribed methodology for calculating TRI chemical thresholds would result in the generation of little or no chemical information from Oil and Gas. Such a conclusion is perfectly consistent with and supports the determination made by EPA in 1997 that Oil and Gas should not be subject to TRI reporting under EPCRA.

D. Trade Secrets are Protected under EPCRA

At various points, the Petitioners argue—either directly or through implication—that subjecting Oil and Gas to TRI reporting is necessary because state disclosure rules improperly allow companies to withhold certain chemical information as trade secrets or confidential business information.[40] Petitioners fail to note, however, that EPCRA also includes provisions to protect trade secrets and to allow persons to withhold certain chemical identity information and instead provide the generic class or category of the trade secret chemical.[41] Thus, even if an individual oil and gas extraction facility was required to submit a TRI report, EPCRA would allow that facility to withhold chemical identity information, much like many of the state programs that Petitioners find deficient.

A pointed example of Petitioners' failure to acknowledge the extent of trade secret protection afforded by EPCRA is the discussion of what the Petitioners characterize as the "physician 'gag rule'"[42] enacted in Pennsylvania as part of the recent comprehensive amendments to the Pennsylvania Oil and Gas Act.[43] While Petitioners cast these provisions as "controversial" (echoing the term three times in a single paragraph) and in an overall negative light, they fail to

[37] *Id.* at 78.
[38] *Id.*
[39] *See* 40 C.F.R. § 372.25(a)-(b). Petitioners cite some questionable data and indicate that the use of two TRI chemicals, aluminum and methanol, may in limited circumstances exceed TRI use thresholds. Assuming Petitioners' data is credible, these isolated operating scenarios, if true, are insufficient to justify subjecting an entire industry to the TRI reporting program.
[40] *See* Petition at 63-66.
[41] 42 U.S.C. § 11042.
[42] Petition at 66.
[43] Act of Feb. 14, 2012, P.L. 87, No. 13, 58 Pa. C.S. §§ 2301-3504.

acknowledge that the Pennsylvania provisions are based in large part upon EPCRA Section 322, [44] which, like Pennsylvania's statute, allows persons disclosing confidential trade secret TRI information to health professionals for purposes of medical treatment to require those health professionals to execute a confidentiality agreement that prohibits use of the trade secret information other than for health reasons set forth in a statement of need.

Petitioners may respond that their concern over the trade secret issue is really the framework by which information can be designated a trade secret, and that EPCRA would provide what they believe to be a more robust process for substantiating and potentially challenging trade secret claims. While it may be accurate to say that EPCRA provides different procedures associated with withholding trade secrets, absent a demonstration that current state programs are improperly allowing persons to withhold trade secrets from disclosure (*e.g.*, by being so broad as to allow non-trade secret information to be withheld), the difference in procedures cited by Petitioners does not address the key question for TRI reporting purposes: whether subjecting Oil and Gas to the TRI program would reasonably be anticipated to increase the information made available pursuant to EPCRA Section 313 or otherwise further the purposes of EPCRA Section 313. In other words, contrary to Petitioners' claim, subjecting Oil and Gas to EPCRA Section 313 would not necessarily increase the amount of information disclosed about chemicals that have been designated trade secrets under various state programs.

E. TRI Reporting Is Not Necessary to Spur Oil and Gas Advances

At various points, Petitioners portray the Oil and Gas as free from meaningful environmental regulation and argue that absent TRI reporting, Oil and Gas has "no incentives to find their own way of preventing pollution, to choose less toxic alternatives, or to do anything other than maximize oil and gas production and address the impacts after they have occurred." [45] Conditions in the field, especially here in the Marcellus region, paint a much different picture, however, and illustrate that Petitioners' statement—like much of the rest of the Petition—is hyperbole.

As an initial matter, aspects of the natural gas industry in the Marcellus region are subject to dozens of state and federal environmental laws and regulations enforced by no fewer than fourteen state, federal and regional agencies that routinely review pollution prevention and minimization plans as part of granting authorizations for natural gas activities. For example, Pennsylvania regulations require well operators to develop a wastewater reduction strategy that identifies "the methods and procedures the operator shall use to maximize the recycling and reuse of flow back or production fluid either to fracture other natural gas wells, or for other beneficial uses."[46] In accordance with that regulation, and in concert with other voluntary efforts, use of recycled flow back water in the Marcellus region has increased dramatically, with operators now recycling approximately 85% of flow back water collected from hydraulic fracturing operations.

Aside from regulatory incentives, the industry has taken many voluntary steps to develop methods to reduce its environmental footprint. On an organizational level, the MSC continues to

[44] 42 U.S.C. § 11042.
[45] Petition at 79.
[46] 25 Pa. Code 95.10(b)(2).

develop a series of Recommended Practices for the natural gas industry operating in the Marcellus region that are designed to assist industry professionals consistent with the MSC's guiding principle to implement state of the art environmental protection across all operations. To date, the MSC has published five Recommended Practices and is in the process of developing more.

With respect to the use of chemicals specifically, a number of companies are currently working to develop hydraulic fracturing fluid formulas that use less TRI chemicals as well as other systems and related technologies. For example, there has been progress both on "environmentally friendly" biocides and on alternate methods to treat bacteria that involve ultraviolet light instead of chemicals. Contrary to Petitioners' claims, these innovations have occurred without a requirement that Oil and Gas report TRI chemicals.

III. Conclusion

In 1997, EPA declined to add Oil and Gas to the list of industries subject to TRI reporting after finding that it was unlikely that operations of individual oil and gas extraction facilities would exceed applicable TRI thresholds. While Oil and Gas has undoubtedly evolved over the past fifteen years, the basis of EPA's determination has not changed. After discounting many pages of irrelevant and sometimes misleading data, ultimately Petitioners arguments rest upon (1) EPA adopting a new definition of what qualifies as a "facility" for purposes of EPCRA reporting, something that would require new legislative authority; (2) a fundamental misunderstanding of how facilities determine whether TRI thresholds have been met; and (3) the false belief that TRI reporting by Oil and Gas will result in the availability of more public information and will lead to greater incentives for innovation. Accordingly, for all of the reasons stated above, the MSC respectfully requests the Agency to reject the Petition.

We appreciate your consideration of the MSC's position on this important matter. Please contact me if any further information is required.

Yours very truly,

Kathryn Z. Klaber
President